SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,
Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The Petitioner, Clark County, Nevada, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada rendered in this proceeding on June 6, 1973.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of Nevada appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada was rendered on June 6, 1973. A timely petition for rehearing was denied on June 25, 1973, and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the various states from protecting the governmental tortfeasor by requiring that the tort claimant give special notice as a condition precedent to suit.

2. Whether the legislative creation of two classes of tortfeasors, governmental vis-a-vis private, is so arbitrary and irrelevant to the achievement of the state's objective as to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether it is a proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to prohibit legislation by which the state treats victims of torts committed by governmental entities differently than victims of torts committed by private persons.

STATEMENT OF THE CASE

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital, a Clark County Hospital, with a chronic kidney infection and hypertensive cardiovascular disease and was discharged on October 14, 1966. She was readmitted and again discharged on November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The physician who performed the postmortem examination diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim on behalf of the minor children of Barbara Adams was filed with the Board of County Commissioners of Clark County, Nevada. However, such filing was not made within the six months' period as required by NRS 244.245 and NRS 244.250 and as required by NRS 41.031 through NRS 41.039[1] which set forth the statutory scheme pursuant to which the State of Nevada waived the pre-existing governmental immunity. After rejection of that claim a complaint was filed by Respondent, Margaret Turner, as legal guardian for the minors, against the Clark County Board of Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the Board of County Commissioners in their individual capacities was dismissed by summary judgment and no appeal has been taken from that judgment. The complaint against Clark County was

1. See appendix attached hereto.

dismissed on motion for summary judgment for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250. Subsequently, the complaint against Jack Staggs was also dismissed. A trial was held on the alleged malpractice of Dr. H. Q. Adams, and the jury returned a defense verdict.

The Respondent appealed these judgments to the Supreme Court of the State of Nevada, where the challenge to the constitutionality of NRS 244.245 and NRS 244.250 was raised for the first time in oral argument. The Nevada Supreme Court, without considering at that time the other issues raised by the appeal, remanded the matter to the district court for a determination of the constitutionality of NRS 244.245 and NRS 244.250.

On remand the district court refused to review the wisdom of a previous decision of the Nevada Supreme Court declaring that the statutes in question were constitutional and therefore returned the case to the Supreme Court of Nevada for disposition of the appeals.

In its opinion rendered on June 6, 1973, that Court refused to consider the appeals with respect to the dismissal of the complaint against Jack Staggs or the defense verdict in favor of Dr. Adams. With respect to the granting of summary judgment in favor of Clark County and its hospital, however, the Court determined that the statutes in question were repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the dismissal of the complaint against Clark County was therefore reversed and the cause remanded for further proceedings (see appendix hereto). Clark County's petition for rehearing of the matter was denied by the Nevada Supreme Court on June 25, 1973.

REASONS FOR GRANTING THE WRIT

I

The decision below conflicts with the determination of the highest courts of other states as to the proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in relation to statutes which conditionally waive governmental immunity.

Concededly such decision follows the determination of the Supreme Court of the State of Michigan, finding that equal protection is violated by statutes limiting actions against the state. *Reich* v. *State Highway Department*, 386 Mich. 617, 194 N.W.2d 700 (1972). However, identical questions have been presented to the highest courts in California and Illinois, and in both states statutes limiting claims against governmental tortfeasors were found not to be violative of the Equal Protection Clause. *Tammen* v. *County of San Diego*, 58 Cal. Rptr. 249, 426 P. 2d 753 (1967); *Housewright* v. *City of LaHarpe*, 51 Ill. 2d 357, 282 N.E.2d 437 (1972). See also *Hutchinson* v. *Board of Trustees of University of Alabama*, 288 Ala. 20, 256 So. 2d 281 (1971); *Krause* v. *State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), app. dis. 41 U.S.L.W. 3329, reh. denied 41 U.S.L.W. 3410 (1973).

Hence a serious conflict of authority upon an important constitutional question is presented. A grant of certiorari should therefore issue from the United States Supreme Court in order that this question be finally resolved and the proliferation of divergent constitutional interpretations be prevented.

II

The decision below decides a substantial federal question in a way contrary to the applicable decisions of the United States Supreme Court.

Mr. Chief Justice Warren, speaking for the Court in *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961), aptly stated the application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to state statutes:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The decision below cites no "suspect" classification[2] or any deprivation of a fundamental constitutional right[3] which would extinguish the traditional presumption of

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2. See e.g., *Gomez* v. *Perez*, 93 S.Ct. 872 (1973) (illegitimacy); *Graham* v. *Richardson*, 403 U.S. 365 (alienage); *Griffin* v. *Illinois*, 351 U.S. 12 (indigency); *Brown* v. *Board of Education*, 347 U.S. 483 (race); *Oyama* v. *California*, 332 U.S. 633 (national origin).

3. See e.g., *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92 (free speech); *Shapiro* v. *Thompson*, 394 U.S. 618 (freedom of interstate travel); *Williams* v. *Rhodes*, 393 U.S. 23 (freedom of association); *Skinner* v. *Oklahoma, ex rel. Williamson*, 316 U.S. 535 ("liberty" conditionally protected by Due Process Clause of Fourteenth Amendment).

validity accorded a duly enacted state law. In fact, the decision below offers no basis upon which to find claim and notice statutes "arbitrary" other than the Court's determination that, "Within our present scheme of government, claim statutes serve no real beneficial use [citation omitted] but they are indeed a trap for the unwary." *Turner* v. *Staggs*, No. 6770 (Nev. Sup. Ct., June 6, 1973). Petitioner respectfully submits that these are wholly inadequate reasons upon which to find that the Equal Protection Clause has been offended.

The statutes overturned below are clearly the product of a comprehensive plan devised by the Nevada Legislature to provide Petitioner with sufficient time effectively to investigate, defend and allocate funds for actions brought against it. Moreover, they provide the basis from which Petitioner may administratively settle tort claims, thereby reducing the load of an over-burdened judiciary.

The decision below thus takes a new and unchartered direction in the application of the Equal Protection Clause to state statutes, a course of action which is clearly condemned in the recent case of *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278 (1973).

A grant of certiorari is therefore justified in order that the United States Supreme Court may review the indiscriminate departure which the decision below has taken with regard to the applicability of the Equal Protection Clause of the Fourteenth Amendment and to bring the decision below within the scope of standards heretofore promulgated by the United States Supreme Court.

III

The decision below poses a significant constitutional issue of great public concern, the ramifications of which will repeatedly present themselves to the courts unless a conclusive judgment is rendered by the United States Supreme Court.

Because of the extensive geographic and official activity of state and local governments, it is imperative that notice of tort claims be brought expeditiously before their respective governing bodies. Frequently, the filing of such notice constitutes the sole means by which governing officials may receive actual notice of a tort claim and affords the first opportunity for the governmental entity to marshal its evidence.

Problems resulting from the filing of claims too remote in time, such as those involving investigation, procurement of witnesses and budgeting, are thus greatly magnified for the governmental tortfeasor as opposed to its private counterpart. By nullifying those statutes which insure timely notice of a claim, the decision below severely reduces the effectiveness of the state and its political subdivisions to defend tort actions.

More importantly, however, the constitutional rationale employed below draws into serious question the constitutionality of a panoply of related statutes aimed at limiting actions against the state and its political subdivisions. Should private and governmental tortfeasors be unconditionally placed on equal footing, as determined by the Court below, statutes setting recovery limits, prohibiting punitive damages or exempting from liability actions by the state militia would, for the same reason, necessarily be found to be repugnant to the Equal Protection Clause of the Fourteenth Amendment.

The drastic consequences of the above are readily apparent. Should the decision below remain unchecked, nullification of the entire statutory scheme of limiting suits against the state or its political subdivisions would seem constitutionally mandatory. The burdens thus imposed ultimately will be visited upon the citizen. Increased taxes and expanded governmental bureaucracy are the foreseeable results.

Nor is Petitioner alone in this respect. No fewer than eleven states have enacted tort claim statutes similar to those struck down below. Application of the Equal Protection Clause of the Fourteenth Amendment in the manner of the decision below will generate a multiplicity of suits, which will ultimately compel a decisive ruling from the nation's Supreme Court.

A grant of certiorari is thus mandated to finally resolve this important constitutional issue which materially bears upon a broad range of governmental functions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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August 31, 1973.

APPENDIX

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEVADA REVISED STATUTES, CHAPTER 244

244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

NEVADA REVISED STATUTES, CHAPTER 41

41.031 Waiver by state, its agencies and political subdivisions of immunity from liability and action; actions; State of Nevada as defendant; service of summons. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the state, and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. An action may be brought under this section against the State of Nevada, any agency of the state, or any political subdivision of the state. In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state.

41.032 Conditions and limitations on actions: Employees' acts or omissions. No action may be brought under NRS 41.031 or against the employee which is:

1. Based upon an act or omission of an employee of the state or any of its agencies or political subdivisions, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused.

41.033 Conditions and limitations on actions: Failure to inspect, discover. No action may be brought under NRS 41.031 or against the employee which is based upon:

1. Failure to inspect any building, structure or vehicle, or to inspect the construction of any street, public highway or other public work to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect;

2. Failure to discover such hazard, deficiency or other matter, whether or not an inspection is made.

41.0335 Conditions and limitations on actions: Acts, omissions of sheriffs' deputies, police officers.

1. No action may be brought against:

(a) Any sheriff which is based solely upon any act or omission of a deputy; or

(b) A chief of a police department which is based solely upon any act or omission of an officer of such department.

2. Nothing contained in this section shall be construed:

(a) To limit the authority of the state or a political subdivision or a public corporation of the state to bring an action on any bond or insurance policy provided pursuant to law for or on behalf of any person who may be aggrieved or wronged.

(b) To limit or abridge the jurisdiction of any court to render judgment upon any such bond or insurance policy for the benefit of any person so aggrieved or wronged.

41.035 Limitation on award for damages in action sounding in tort.

1. No award for damages in an action sounding in tort brought under NRS 41.031 may exceed the sum of $25,000 to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages or as interest prior to judgment.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this state.

(b) Any person with respect to any land or water leased or otherwise made available by such person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions

of this paragraph shall not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other waters owned or controlled by any public or quasi-municipal agency or corporation of this state, wherever such land or water may be situated.

41.036 Conditions, limitations on actions against state, counties, cities, unincorporated towns, other political subdivisions.

1. No action shall be brought under NRS 41.031 against a county without complying with the requirements of NRS 244.245 to 244.255, inclusive, or against a city without complying with the requirements of NRS 268.020, or against an unincorporated town without complying with the provisions of NRS 269.085, or against the state or any agency or other political subdivision of the state without complying with the requirements of subsection 2 or 3 of this section.

2. Every claim against the state arising out of contract shall be presented in accordance with the provisions of NRS 353.085 or 353.090, and every claim for refund in accordance with the provisions of NRS 353.110 to 353.120, inclusive. Every other claim against the state or any of its agencies shall be presented to the ex officio clerk of the state board of examiners within 6 months from the time the cause of action accrues. He shall within 10 days refer each such claim to the appropriate state agency, office or officer for investigation and report of findings to the board. No action may be brought unless the board refuses to approve or fails within 90 days to act upon the claim.

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

41.037 Administrative settlement of claims. Upon receiving the report of findings as provided in subsection 2 of NRS 41.036, the state board of examiners may allow and approve any claim against the state or any of its agencies arising under NRS 41.031 to the extent of $1,000. Upon approval of any claim by the state board of examiners, the state controller shall draw his warrant for the payment thereof, and the state treasurer shall pay the same from the reserve for statutory contingency fund. The governing body of any political subdivision whose authority to allow and approve claims is not otherwise fixed by statute may allow and approve any claim against that subdivision arising under NRS 41.031 to the extent of $1,000 and pay it from any funds appropriated or lawfully available for such purpose.

41.038 Insurance of state, political subdivisions, officers, employees against liability.

1. The state and any political subdivision may:

(a) Insure itself against any liability arising under NRS 41.031.

(b) Insure any of its officers or employees against tort liability resulting from an act or omission in the scope of his employment.

(c) Insure against the expense of defending a claim against itself whether or not liability exists on such claim.

2. Any school district may insure any peace officer, requested to attend any school function, against tort liability resulting from an act or omission in the scope of his employment while attending such function.

41.039 Filing of valid claim against political subdivision condition precedent to commencement of action against employee, officer. An action which is based on the conduct of any employee or appointed or elected officer of a political subdivision of the State of Nevada while in the course of his employment or in the performance of his official duties may not be filed against such employee or officer, prior to the filing of the complaint in such action, a valid claim has been filed, pursuant to NRS 41.031 to 41.038, inclusive, against the political subdivision for which such employee or officer was authorized to act.

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA KAY HOLLINS, MARVER ADAMS,

Plaintiff,

-vs-

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LaPORTA, JAMES RYAN, County Commissioners of Clark County, et al.,

Defendants.

DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed January 13, 1971)

It appearing that there are no genuine issues of fact or law as to the possible liability of Robert Baskin, Darwin Lamb, William Briare, Lou LaPorta, and James Ryan, in their individual capacities, defendants' motion for summary judgment is granted as to these defendants.

As to defendants JACK STAGGS and CLARK COUNTY, NEVADA, defendants' motion for summary judgment is denied.

DATED this 13th day of January, 1971.

/s/ Howard W. Babcock
District Judge

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiff,

-vs-

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, SOUTHERN NEVADA MEMORIAL HOSPITAL, JACK STAGGS, Administrator thereof, DR. H. Q. ADAMS, et al., and CLARK COUNTY,
Defendants.

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed August 6, 1971)

On January 13, 1971, this Court entered an order granting summary judgment in favor of defendants Robert Baskin, Darwin Lamb, William Briare, Lou La Porta and James Ryan in their individual capacities. Summary judgment was denied as to defendants Jack Staggs and Clark County.

Pursuant to motion of defendant Clark County, and good cause appearing, on July 26, 1971, this Court granted leave to defendant Clark County for a rehearing on its motion for summary judgment. The basis of the motion for summary judgment is failure on the part of the plaintiff

herein to file a *timely* claim with the Board of County Commissioners pursuant to NRS 244.245 and NRS 244.250.

It is the law of this state that presentation of a claim to the board of county commissioners within 6 months from the time such claim becomes due and payable is a *condition precedent* to an action against a county. *Barney* v. *Clark County*, 80 Nev. 104, 389 P.2d 392 (1964).

There are no genuine issues of material fact to be determined. It is undisputed that no claim relating to this cause was filed with the board of county commissioners until approximately 13 months after the claim arose.

A condition precedent to an action against the county in this matter being unfulfilled, no such action may be maintained. Clark County is entitled to judgment as a matter of law.

That there has been a previous mistrial of this cause does not affect this judgment. In legal effect, a mistrial is equivalent to no trial at all. 58 C.J.S. 834. Accordingly, it is

ORDERED, that defendant Clark County's motion for summary judgment be, and it hereby is, granted.

DATED this 6th day of August, 1971.

/s/ Howard W. Babcock
District Judge

CASE No. A 50218

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiff,

v.

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, SOUTHERN NEVADA MEMORIAL HOSPITAL, JACK STAGGS, Administrator thereof, DR. H. Q. ADAMS, et al., and CLARK COUNTY,
Defendants.

JUDGMENT OF DISMISSAL

(Filed August 25, 1971)

The Motion of Defendant JACK STAGGS for a dismissal pursuant to Rule 41(b), Nevada Rules of Civil Procedure, having been made and heard on the 19th day of August, 1971, the parties and their counsel being present, and the Court having heard argument of counsel, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED, that the complaint of the Plaintiff be and the same is hereby dismissed with prejudice, as to the Defendant JACK STAGGS.

DATED this 25th day of August, 1971.

/s/ Joseph S. Pavlikowski
District Judge

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Chartered
By /s/ Harry M. Reid
Attorneys for Defendant, Jack Staggs
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Las Vegas, Nevada

CASE No. A 50218

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA KAY HOLLINS, MARVAR ADAMS,
Plaintiffs,

vs.

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, et al.,
Defendants.

JUDGMENT

(Filed August 25, 1971)

This action came on for trial before the Court and a jury, Honorable Joseph S. Pavlikowski, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendant H. Q. Adams, M.D. recover of Margaret Turner, as Legal Guardian of Lionel Eugene Hollins, Yolanda Kay Hollins and Marver Adams, Plaintiffs, his costs of action.

DATED at Las Vegas, Nevada, this 25th day of August, 1971.

Loretta Bowman
Clerk of Court
By /s/ Lucille Bunyard

/s/ James F. Pico
Attorney for Defendant H. Q. Adams, M.D.
324 South Third Street
Las Vegas, Nevada

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 6770

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Appellants,

vs.

JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY,
Respondents.

ORDER

(Filed August 4, 1972)

The court being of the opinion that the constitutionality of the claim statute involved herein should be decided; and the subject not having been raised in the trial court; it is

ORDERED that the case is remanded to the Honorable Joe Pavlikowski, Judge of the Eighth Judicial District Court, so he may establish an appropriate briefing schedule and render his determination of that question.

/s/ Zenoff, C. J.
/s/ Batjer, J.
/s/ Mowbray, J.
/s/ Thompson, J.
/s/ Gunderson, J.

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiffs,

-vs-

JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY,
Defendants.

ORDER

(Filed March 30, 1973)

The Nevada Supreme Court remanded the case herein (Supreme Court Case No. 6770) to this Court for a determination of the "constitutionality of the claims statute involved herein." The issue was set down for hearing before this Court. Upon the conclusion of that hearing, the matter was taken under advisement.

This Court has expended a considerable amount of time exploring the ramifications of the issue tendered in this case. After careful consideration of all the factors involved, this Court concludes that it cannot give accommodation to the order of the Nevada Supreme Court.

That order is unclear as to whether this Court is to review *Barney* v. *Clark County*, 80 Nev. 104, 389 P.2d 392 (1964) alone, or whether the broader issue of constitutionality *per se* is involved. In either event, it is not the

function of this Court to either affirm or disaffirm previous decisions of the Nevada Supreme Court. *McKay* v. *Industrial Commission*, 103 Ariz. 191, 438 P.2d 757 (1968). Such would be the effect of any decision rendered by this Court regarding the constitutionality of the claims statute involved herein. Therefore, it is

ORDERED, that the Record on Appeal and the Exhibits heretofore filed, and those briefs filed subsequent to the return of the case to this Court, be returned to the Clerk of the Nevada Supreme Court.

DATED this 30th day of March, 1973.

/s/ Howard W. Babcock
District Judge

89 Nev., Advance Opinion 78

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS, Appellant, *v.* JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY, Respondents.

No. 6770

June 6, 1973

Appeal from summary judgment, judgment of dismissal and judgment entered pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, and Howard W. Babcock, Judges.

Affirmed in part; reversed and remanded in part.

THOMPSON, C. J., and MOWBRAY, J., dissented in part.

Charles L. Kellar, of Las Vegas, for Appellant.

Beckley, DeLanoy & Jemison, of Las Vegas, for Respondents Jack Staggs and Clark County.

James F. Pico, of Las Vegas, for Respondent Dr. H. Q. Adams.

OPINION

By the Court, BATJER, J.:

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital with a chronic kidney infection and hypertensive cardiovascular disease, and she was discharged on October 14, 1966. She was readmitted and again discharged November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. James Y. Clarke, M.D., who performed the postmortem examination, diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim was filed on behalf of the minor children of Barbara Adams with the Board of County Commissioners of Clark County, Nevada, on November 2, 1967. After rejection of the claim a complaint was filed on December 21, 1967, by Margaret Turner, as legal guardian for the minors[1] against the Clark County Board of Commissioners,

1. In her answer to interrogatories subscribed and sworn to on February 23, 1968, and filed in this action on February 25, 1968, Margaret Turner alleges that she was appointed the legal guardian of the minors by the Eighth Judicial District Court; however, this court finds nothing in the record before it to verify that allegation.

Southern Nevada Memorial Hospital,[2] Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the board of county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970, and no appeal has been taken from that judgment. The complaint against Clark County was dismissed on motion for summary judgment on August 6, 1971, for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[3] See also, NRS 41.031 and NRS 41.036. On August 25, 1971, the complaint against Jack Staggs was dismissed pursuant to NRCP 41(b). A trial was held on the alleged malpractice of Dr. H. Q. Adams and the jury returned a defense verdict.

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2. This court has held that county hospitals, established pursuant to statutory authority [NRS 450.010 et seq.], are without legal entity, and thus not subject to suit for tort. Bloom v. So. Nev. Hospital, 70 Nev. 533, 275 P.2d 885 (1954); McKay v. Washoe General Hospital, 55 Nev. 336, 33 P.2d 755 (1934). Thus, the dismissal of Southern Nevada Memorial Hospital from the suit appears to have been mandated by this court's prior decisions.

3. NRS 244.245: "1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

"2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then the costs shall be recovered against him by the county, and may be deducted from the demand."

NRS 244.250: "1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

"2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with."

In this appeal it is contended that the district court erred (1) in granting summary judgment in favor of Clark County and its hospital; (2) in dismissing the complaint agianst Jack Staggs as administrator of Southern Nevada Memorial Hospital;[4] and (3) in giving certain instructions to the jury.

1. We cannot consider issues 2 and 3 because we have not been favored with a transcript of the proceedings in the district court, nor has the appellant submitted a settled and approved statement of the evidence or proceedings. NRCP 75(n).

2. We direct our attention to the summary judgment. The claim against Clark County was not filed until 13 months had elapsed after the death of Barbara Adams. NRS 244.250 requires that a claim against a county must be filed within 6 months after a cause of action arises.

In Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), this court held that the timely filing of a claim was a condition precedent to the commencement of an action against a county. *Barney* relied upon the reasoning in Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942). Artukovich in turn relied in part on the principle that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission. In 1956 the State of Nevada, acting through its legislature, waived its immunity from liability and action and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations. Stats. of Nev., 1965, ch. 505,

4. In Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), this court held that a county is the party legally responsible for the obligations of a county hospital. Under the doctrine of respondeat superior, it would appear that dismissal of the complaint against Jack Staggs, Administrator of the Southern Nevada Memorial Hospital, was proper.

p. 1413, codified as NRS 41.031. Furthermore the enactment placed all political subdivisions in a similar position. NRS 41.031.[5]

The requirement of giving notice presupposes the existence of an individual capable of giving it. McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972). To hold otherwise would be disregard reality. Cf. Walgreen Co. v. Industrial Commission, 153 N.E. 831 (Ill. 1926); Lineberry v. Town of Mebane, 13 S.E.2d 429 (N.C. 1941). NRS 244.245 contains no provision for the filing of a claim by anyone other than the claimant. At the time of their mother's death the minor children were between the ages of 5 and 13 years. In many jurisdictions children of tender years, because they are powerless to act, have been excused from compliance with notice provisions. Simpson v. City of Abilene, 388 S.W.2d 760 (Tex.Civ.App. 1965), (7 years old). See also, City of Barnesville v. Powell, 183 S.E.2d 55 (Ga.App. 1971), (4 years old); McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918), (7 years old); Lazich v. Belanger, 105 P.2d 738 (Mont. 1940), (7 years old); Murphy v. Village of Ft. Edward, 107 N.E. 716 (N.Y. 1915), (5 years old); Webster v. City of Charlotte, 22 S.E.2d

5. NRS 41.31: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise proved in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. *The State* of Nevada further *waives the immunity from liability and action of all political subdivisions of the state,* and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.036, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. *An action may be brought* under this section *against* the State of Nevada, any agency of the state, or *any political subdivision of the state.* In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state." [Emphasis added.]

900 (N.C. 1942), (8 years old); 18 E. McQuillin, The Law of Municipal Corporations § 53.159 (3rd rev. ed. 1963).

We could conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W. 2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. However, we believe that the notice of claim requirements found in NRS 244.245 and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.[6]

Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow *Barney*, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit. Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law.

The court in *Artukovich* claims to have been following the "great weight of authority," and that may have been true in 1942, but since then, many jurisdictions have limited or abandoned the doctrine of sovereign immunity, either by legislative enactments or judicial decisions. Likewise,

6. The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise.

claim statutes have been found to violate the equal protection provision of the Fourteenth Amendment of the United States Constitution and have been declared unconstitutional. Reich v. State Highway Department, 194 N.W.2d 700 (Mich. 1972); Friedman v. Farmington Township School District, 198 N.W.2d 785 (Mich.App. 1972); Crook v. Patterson, 201 N.W.2d 676 (Mich.App. 1972).

The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of NRS 244.245 and NRS 244.250 have the effect of arbitrarily dividing all tort-feasors into classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed.

In Reich v. State Highway Dept., supra, the Michigan Supreme Court said: "This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

"Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses; victims of governmental negligence who must meet requirement, and victims of private negligence who are subject to no such requirement." 194 N.W.2d at 702.

Contrary to the mandate of Art. 8, § 5 of the Nevada Constitution[7] and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar.

Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, § 2, Nevada Constitution.

The statutory provisions of this state which provide that no person shall sue a governmental entity of this state for a demand arising out of governmental tort unless they first present a claim within 6 months from the time such tort occurred are void and of no effect.

The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of Dr. H. Q. Adams, pursuant to a jury verdict, are affirmed.

GUNDERSON, J., concurs.

ZENOFF, J., concurring:

I agree with Justices Batjer and Gunderson that the questioned statute is unconstitutional. I add, however, my additional thoughts for I believe that we can consider this case and reach the same result for the further reasons

7. In Lincoln County v. Luning, 133 U.S. 529, 531 (1890), the High Court, specifically referring to Art. 8, § 5, of the Nevada Constitution, held: "[T]hat this section is not to be limited to private corporations is evident not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named."

stated. For the purpose of these stated reasons I respectfully recite the facts in my own manner in order to provide the posture which will be explained.

A complaint was filed December 21, 1967 against the Clark County Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, and Dr. H. Q. Adams, for the wrongful death of one Barbara Adams, mother of the real minor plaintiffs by their legal guardian.

Barbara Adams was admitted to the hospital on October 1, 1966 with chronic kidney infection and hypertensive cardiovascular disease; she was discharged on October 14, 1966. A second time she was admitted; she was discharged November 14, 1966 in an improved condition with the understanding that she would be transferred to Los Angeles for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The postmortem examination by Dr. Clarke attributed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance. Barbara was pronounced dead on arrival at the hospital on November 17, 1966.

A claim was filed on behalf of the minor children of Barbara with the appropriate county board on November 2, 1967. After rejection, a civil action against the respondents and others was commenced on December 21, 1967.

The claim against the county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970 and the action against Clark County was dismissed on motion for summary judgment on August 6, 1971 for failure to present a timely claim pursuant to

NRS 244.245 and NRS 244.250.[1] On August 25, 1971, a dismissal pursuant to NRCP 41(b) was entered as to Jack Staggs. A trial was had as to the alleged malpractice of Dr. H. Q. Adams wherein the jury returned a defense verdict.

Three main issues were raised for my consideration.[2]

1. Did the court err in granting summary judgment as to Clark County and its hospital?

2. Did the court err in dismissing the claim against Jack Staggs as Administrator of Nevada Southern Memorial Hospital?

3. Did the court err in giving certain instructions to the jury?

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1. 244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

2. The question of the constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. We therefore remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, infra, need be reviewed as to that point.

We have no transcript presented to us, thus I cannot consider Issues 2 and 3. The central issue now is directed to the first point.

1. I glean from this record that the deceased was black, sick and impoverished when she died leaving three children in their early minority. The claim against the county and the hospital was not filed for 13 months after her death. NRS 244.250 requires that a claim against a county must be filed within 6 months and under Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), a claim must be filed as a condition precedent to the commencement of an action against the county. That case was founded upon Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942), which marked by a spirited division of the California Supreme Court (4-3) affirmed the established weight of authority that an action against a public entity cannot be filed even by a minor unless the claim statute, if there be one, is first observed.

This case, however, poses a different problem. A claim was filed but not within the statutory 6 months. No reason is given for the failure to file within the statutory period. It is, however, contended that the statutory 6-month period was tolled during the children's minority by reason of NRS 11.250 which provides that if a person is entitled to bring an action other than for the recovery of real property, the time within which the cause of action must be commenced is tolled if that person is within the age of 21 years. This court has adopted the rule expressed in Artukovich v. Astendorf, supra, and I therefore feel compelled to maintain the continuity established by the respected Supreme Court of California. That court later established in Williams v. Los Angeles Metropolitan Transit Auth., 440 P.2d 497 (Cal. 1968), that where the filing of a claim in advance of suit is required, that re-

quirement is suspended during the period of minority if the action is "mentioned" in the limitation statute as one the person could bring. It is so mentioned in Nevada's statutes, NRS 41.036(3)[3] and NRS 11.190(5)(b).[4]

In Williams v. Los Angeles Metropolitan Transit Auth., supra, the plaintiff filed the required claim within the prescribed time but failed to file his action against the public entity within the 6 months required after rejection of the claim. I accept, by analogy, the holding in Williams v. Los Angeles Metropolitan Transit Auth., supra, since Califorina's tolling statute during minority is the same as ours.

2. I am not disturbed by the language of Barney v. County of Clark, supra, which emphasizes *timely* filing since the question of timeliness was not an issue in that case any more than in Kelleher v. Ephrata School District, 355 P.2d 989 (Wash. 1960), cited therein. The point involved in both cases was whether a claim must be filed at all. Timeliness was not the question.

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3. 41.036(3):

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

4. 11.190(5)(b): Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

3. Nor am I concerned with the fine-line distinction of whether the claim statute is a statute of limitation or a procedural roadblock as a condition precedent to suit. That question was considered in Myers v. Stevenson, 270 P.2d 885, 889 (Cal.App. 1954), and discarded as not being controlling as to the merits of the case. The trend is to construe statutes in such manner as to effectuate the long-recognized principle that children are to be protected during their minority from the destruction of their rights by the running of the statutes of limitation. Williams v. Los Angeles Metropolitan Transit Auth., supra; Los Angeles City School District v. Superior Court, 88 Cal.Rptr. 286 (Cal.App. 1970). The majority will argue that the Williams case, supra, does not apply, that there is a difference between a statute of limitation and a condition precedent to suit. The minors here are entitled to the benefits of the tolling statute. Whether the claim statute be called a statute of limitations or a condition precedent is of no moment. A review of other authorities reflects the foretold positive trend against the rigidity of the claim statutes, particularly as they affect the rights of minors.

THOMPSON, C. J., with whom MOWBRAY, J., agrees, dissenting in part:

I would affirm the summary judgment for Clark County and, therefore, dissent from that aspect of the Court's opinion.

1. The timely filing of claims with the Board of County Commissioners is a precondition to the existence of a cause of action against the County. Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964). The minority of the children of the decedent does not excuse noncompliance nor extend the time for compliance, since proper claims could have been timely filed by their legal repre-

sentative. Although it is true that the period of disability of a minor shall not be part of the time limited for the commencement of an action, NRS 11.250; Parker v. Chrysler Motors Corp., 88 Nev. 560, 502 P.2d 111 (1972), that provision applies only when considering the affirmative defense of the statute of limitations, and does not bear upon the duty of minor claimants through their legal representative, to timely file their claims as a condition precedent to the existence of a cause of action. As noted in Barney v. County of Clark, supra, "[w]e are not concerned therefore with a statute in the nature of a statute of limitations; rather we are concerned with the performance of a necessary condition precedent to suit." Id. at 106.

2. The majority opinion voids all statutes precluding suit against a governmental entity for any tort demand unless a claim is first presented. This sweeping declaration nullified NRS 41.036, NRS 244.245 to 244.255, NRS 268.020 and, perhaps, others. Barney v. County of Clark, supra, and Hart v. City of Las Vegas, 73 Nev. 29, 307 P.2d 617 (1957), are silently overruled. Moreover, it renders meaningless, so far as a claim statute is concerned, a substantial body of case law dealing with timeliness and substantial compliance with the intendment of the statute. Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971); Kaminski v. Woodbury, 85 Nev. 667, 462 P.2d 45 (1969); City of Boulder City v. Miles, 85 Nev. 46, 449 P.2d 1003 (1969); Rogers v. State, 85 Nev. 361, 455 P.2d 172 (1969); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952), and Las Vegas v. Schultz, 59 Nev. 1, 83 P.2d 1040 (1938). These cases preserved the integrity of the legislative scheme and at the same time honored the rights of claimants who had met the underlying purposes of the statute. Their rights were not denied for technical or insubstantial

reasons. Whenever a sensible explanation was offered for failing to comply with a claim statute requirement, that explanation was accepted.

It is not per se bad for a court to set aside statutes and ignore case precedent. It is, however, conduct calling for extreme caution. Solid reasons must exist. I perceive no such reasons in the matter at hand. The majority of this Court find that claim statutes violate the command of the Equal Protection Clause of the Federal Constitution. With due deference, I suggest that the Equal Protection Clause does not bear upon the matter.

The legislature has a wide discretion to enact laws which affect some groups of citizens differently than others. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. United States, 366 U.S. 420 (1961). The purpose of a claim statute is to enable the governmental agency to make an early investigation of the claim, of the claimant, and to marshal evidence promptly at a time when it is possible to do so. City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952); Brown v. Board of Trustees, Etc., 104 N.E.2d 866 (N.Y. 1952). This purpose surely is reasonable and not an arbitrary exercise of legislative power. I cannot find it to be irrational nonsense.

All persons injured through the negligence of the state or its political subdivisions have been granted the right to bring suit (except where immunity is retained) and this right is granted equally and without discrimination on any basis whatsoever. NRS 41.031; State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970). This is equality under the same conditions and among persons similarly situated. Boyne v. State ex rel. Dickerson, 80 Nev. 160, 390 P.2d 225 (1964). And, contrary to the view of the majority, the Equal Protection Clause does not require equal treatment of private

persons and the State. Tustin Heights Ass'n. v. Board of Supervisors, 339 P.2d 914 (Cal. App. 1959). This is the thrust of Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971), where we upheld a city claim statute against the contention that a city should not be treated differently than a private corporation. It also is the teaching of State v. Silva, supra, where we held that the State could limit recovery to $25,000 for each claimant without violating the concept of equal protection. Are these recent decisions no longer viable? Have they also been cast aside sub silentio? If it is constitutionally permissible for the State to limit recovery (State v. Silva, supra) how can it be constitutionally impermissible for the State to require that a claim be filed?

As I read the majority opinion it voids the claim statutes insofar as they apply to governmental torts. Are these statutes still operative otherwise? This wholesale slaughter of a complete statutory scheme and of case precedent, both old and recent, is conduct unsuited to the function of this Court. Respectfully, I dissent.

IN THE SUPREME COURT OF THE
STATE OF NEVADA

CLERK'S CERTIFICATE

(Filed July 12, 1973)

STATE OF NEVADA, ss.

I, C. R. Davenport, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the judgment in the matter of Turner v. Staggs, No. 6770.

Judge Howard Babcock

APPEAL FROM JUDGMENT

This matter having been heretofore submitted, and the Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of Dr. H. Q. Adams, pursuant to a jury verdict, are affirmed."

Opinion of the Court by Batjer, J., concurred in by Gunderson and Zenoff, JJ.; Thompson, C.J., and Mowbray, J., dissenting in part by separate opinion.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 6th day of July, 1973.

C. R. Davenport
Clerk of Supreme Court of the
State of Nevada
By /s/ Judith McCulloch
Deputy

Judgment, as quoted above, entered this 6th day of June, 1973.

ON PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed herein, the Court having again reviewed and being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "Respondents' petition for rehearing is denied . . ."

Judgment, as quoted above, entered this 25th day of June, 1973.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 6th day of July, 1973

C. R. Davenport
Clerk of Supreme Court of the
State of Nevada
By /s/ Judith McCulloch
Deputy